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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Darryl P. Black et al.
Serial No. 09/276,056
Filed: 03/25/1999
For: **FAULT TOLERANCE FOR NETWORK ACCOUNTING ARCHITECTURE**

Examiner: Fleurantin, Jean B.
Art Unit: 2172

Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

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Technology Center 2100

Sir:

PETITION UNDER 37 C.F.R. § 1.181

Applicant herein petitions the Commissioner for entry of the amendment filed after final on January 21, 2004 for the above-referenced patent application. Applicant encloses a credit card payment form in the amount of \$130.00 to cover the fees for this petition.

Since the filing of this petition does not stay the period for filing the Appeal Brief, and Applicant has concurrently filed an Appeal Brief asking for the Board to consider this issue, Applicant respectfully requests a refund of this fee in the event that the decision of the Board makes this petition superfluous.

Factual Background

On October 21, 2003 the Patent Office issued an Office Action which was made final. Applicant responded on December 19, 2003. The Patent Office issued an Advisory Action on January 5, 2004. Applicant decided to appeal the case. During the review of the claims in preparation for filing the Notice of Appeal, Applicant noticed a few grammatical inconsistencies and typographical errors in the claims. Applicant filed a supplemental response after final by facsimile transmission on January 21, 2004, with amendments to correct these issues. Applicant mailed a Notice of Appeal to the Patent Office on January 21, 2004, which was received by the Patent Office on January 23, 2004. The Patent Office issued an Advisory Action on February 3, 2004, which, in paragraph 7, failed to indicate whether the amendments would be entered or not. After receipt of the Advisory Action of February 3, 2004, Applicant's attorney called the Examiner on February 5, 2004, requesting clarification. The Examiner verbally indicated that the amendments would not be entered, stating that the amendments did not place the claims in a condition for allowance. Applicant verbally requested reconsideration of the decision in light of

the fact that the amendments placed the claims in better condition for appeal. The Examiner verbally maintained the decision not to enter the claims.

Applicant Requests Entry of the Amendment After Final

Standard

While amendments after final are not made as a matter of right, 37 C.F.R. § 1.116(b) states “[a] amendments presenting rejected claims in better form for consideration on appeal may be admitted.” Furthermore, the text of MPEP § 714.12 mirrors the language of the rule, stating “[a]ny amendment that will place the application . . . in better form for appeal may be entered.” Further, the text of MPEP § 714.13 indicates that wherein an “amendment . . . requires only a cursory review by the examiner, compliance with the requirement of a showing under 37 CFR § 1.116(c) is [not required].”

Argument

Different Examiners treat typographical errors and grammatical issues differently. Some Examiners believe that such errors and issues make the claim indefinite, and they will issue a rejection under 35 U.S.C. § 112 until the errors and issues are corrected. Other Examiners believe that while such errors and issues create problems with the claim, the claim is definite and readily understood. Such Examiners typically object to the claim and provide suggestions as to how to fix the errors and issues. Still other Examiners ignore such errors and issues. Because it is conceivable that the Board of Patent Appeals and Interferences may consider such errors and issues substantial enough to preclude issuance of a Notice of Allowability, fixing such errors and issues reduces the number of issues before the Board of Patent Appeals and Interferences.

The amendments proposed in the response filed January 21, 2004 fixed typographical errors and grammatical issues. Further, the proposed amendments are of such a character that only a cursory review is required by the Examiner and do not raise new issues. For example, in claim 2, the word “processes” has been deleted and the word “processing” substituted therefore such that the claim clause reads “with the second flow aggregation process *processing* the data to generate aggregated records” rather than “with the second flow aggregation process *processes*

the data to generate aggregated records.” In the amended version, the verb tense of “processing” agrees with the tense of the claim clause. In the non-amended version, the verb tense is inconsistent, creating a grammatical issue. By removing the grammatical issue, the amendment simplifies issues for the Board of Patent Appeals and Interferences. Further, such a simple amendment does not change the scope of the claim, does not introduce new matter, and requires only a cursory review by the Examiner.

During the telephonic conversation on February 5, 2004, the Examiner maintained that because the amendments did not put the case in a condition for allowance, they would not be entered. While Applicant acknowledges that entry of these sorts of amendments is discretionary, the Examiner’s insistence that the amendments would not be entered because the amendments did not place the claims in condition for allowance ignores other grounds under which the Examiner is entitled to entertain amendments after final. When Applicant pointed out that Applicant was merely trying to place the claims in better condition for appeal (as stated in the Response to the Advisory Action of January 5, 2004, page 7, lines 4-7), the Examiner indicated that such was not persuasive and the amendments would not be entered.

Conclusion

In light of the fact that the amendments place the application in better condition for appeal, and the application is in fact under appeal, Applicant requests that the Examiner’s decision to not enter the amendment be reversed and the amendment be entered.

CERTIFICATE OF MAILING	
I HEREBY CERTIFY THAT THIS DOCUMENT IS BEING DEPOSITED WITH THE UNITED STATES POSTAL SERVICE AS FIRST-CLASS MAIL, IN AN ENVELOPE ADDRESSED TO: COMMISSIONER FOR PATENTS, PO BOX 1450, ALEXANDRIA, VA 22313-1450, ON MARCH 23, 2004.	
<u>Kelly Farrow</u>	Name of Depositor
<u>[Signature]</u>	Signature
<u>3/23/04</u>	Date of Signature

Respectfully submitted,
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